IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE:	)	Chapter 7 Case
	)	Number 93-30343
JAMES E. TRULL	)	
PAMELA TRULL	)	
	)	FILED
Debtors	)	at 5 O'clock & 00 P.M.
	)	Date: 1-26-95
	)	
JAMES E. TRULL	)	
PAMELA TRULL	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 94-03004A
NATIONSCREDIT COMMERCIAL	)	
CORPORATION	)	
	)	
Defendant	)	

ORDER

James and Pamela Trull, the debtors in the above-referenced bankruptcy case, brought this adversary proceeding pro se, alleging that Nationscredit Commercial Corporation ("Nationscredit") willfully violated the automatic stay of 11 U.S.C. § 362. This claim stems from the injurious attempt at repossession on Nationscredit's behalf by Robert Johnson, an employee of Tatum Recovery, a repossession company hired by Nationscredit to accomplish repossession of the collateral securing Nationscredit's claim. Based upon the evidence presented at trial and applicable

authority I make the following findings of fact and conclusions of law finding a willful violation of the stay of § 362 by Nationscredit and awarding appropriate damages.

The Trulls filed for relief under Chapter 7 of Title 11 United States Code on November 4, 1993. A little over a month later, on the night of December 8, 1993, the Trulls were at home asleep. At 2:49 a.m., the early morning hours of December 9, Mrs. Trull awoke to the sound of the family dog barking frantically. She arose, proceeded to the front of her house and saw a strange man approaching her door on foot. When she answered his pounding on the door, the man began yelling at Mrs. Trull, identifying himself only as a representative of Nationscredit and, using profanity, stated his intention of repossessing a boat which collateralized a loan from Nationscredit. This man was identified at hearing as Robert Johnson, an employee of Tatum Recovery. Mrs. Trull informed Mr. Johnson that she and her husband had filed bankruptcy the previous month and gave him the name of her attorney. Mr. Johnson again yelled at Mrs. Trull, telling her she had not filed bankruptcy and again demanded that she remove any personal belongings from the boat and move her automobiles so he could take possession of the boat. Mrs. Trull attempted to close the door to her home but Mr. Johnson thrust his flashlight into the door jam, forced open the door and prevented Mrs. Trull from closing the door.

The commotion caused by Mr. Johnson awakened Mr. Trull, who approached the struggle. Mr. Johnson again demanded that the

Trulls move their automobiles so he could remove the boat. Mr. Trull demanded that Mr. Johnson leave, which Mr. Johnson adamantly, boisterously and profanely refused to do. Mr. Trull threw his son's B.B. air rifle at Mr. Johnson, forcing him from the door, and then forcibly ejected Mr. Johnson from the Trulls' porch. A fight ensued between Mr. Trull and Mr. Johnson, joined in by the Trull family dog. Mr. Johnson, out-numbered and realizing that he was not gaining possession of the boat, retreated into the night. Unfortunately, however, Mr. Johnson was not yet finished. He proceeded to the Office of the Sheriff of Treutlen County, Georgia and swore out an arrest warrant against Mr. Trull whereupon, and but for having heard the testimony and reviewed the evidence I would find this literally unbelievable, Mr. Trull was arrested and jailed.

Plaintiffs allege a willful violation of the stay of 11 U.S.C. §362(a) by Nationscredit, praying for recovery under § 362(h) of $500 in actual damages and $5,000 in punitive damages. The filing of the petition in bankruptcy triggers the automatic stay of 11 U.S.C. § 362(a), which operates as a stay against any act to obtain possession of or exercise control over property of the estate, as well as any act to collect on a pre-petition claim against the debtor. 11 U.S.C. § 362(a)(3) and (6). "An individual injured by any willful violation of [the] stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). A stay violation did undoubtedly take place, but a

determination of liability for this violation is not easily reached.

Because Mr. Johnson was acting on behalf of Nationscredit, inquiry begins with the law of agency in Georgia. With regard to the liability of a principal for the acts of its agent, Georgia has codified the law of vicarious liability for acts of "servants" at Official Code of Georgia Annotated ("O.C.G.A.") § 51-2-2:

> Every person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily.

The liability for employers with regard to independent contractors is more limited:

> An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer.

O.C.G.A. § 51-2-4. See also O.C.G.A. § 10-6-61 ("The principal shall not be liable for the willful trespass of his agent unless done by his command or assented to by him.") The threshold issue is whether Mr. Johnson's actions were undertaken as an employee or an independent contractor.

The test to be applied in determining the relationship of the parties under their contract lies in whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, which indicates an employer-employee (master-servant) relationship, as distinguished from the right merely to require certain definite results in conformity with a

contract, indicating an employer-independent contractor relationship. Bowman v. C.L. McCord Land & Pulpwood Dealer, Inc., 174 Ga. App. 914, 331 S.E.2d 882 (1981). In the case at hand, the time, manner, and method of repossession were entirely under the control of Mr. Johnson or Tatum Recovery. Nationscredit requested only a result -- repossession. Under the above-stated test, I cannot avoid the conclusion that Mr. Johnson's actions were those of an independent contractor, rather than an employee, and not imputable to Nationscredit.

Having found that these actions were undertaken by Mr. Johnson as an independent contractor hired to undertake repossession, I must also consider the exceptions to non-liability of the employer found in O.C.G.A. § 51-2-5:

> An employer is liable for the negligence of a contractor:
> (1) When the work is wrongful in itself or, if done in the ordinary manner would result in a nuisance;
> (2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed;
> (3) If the wrongful act is in violation of a duty imposed by express contract on the employer;
> (4) If the wrongful act is the violation of a duty imposed by statute;
> (5) If the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury result which is traceable to the interference; or
> (6) If the employer ratifies the unauthorized wrong of the independent contractor.

This section pertains to an employer's liability for the negligence

of an independent contractor and thus is inapplicable to cases which involve intentional torts. Peachtree-Cain Co. v. McBee, 170 Ga. App. 38, 316 S.E.2d 9 (1984). "Negligence" is defined at O.C.G.A. § 51-1-2:

> In general, ordinary diligence is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. As applied to the preservation of property, the term "ordinarily diligence" means that care which every prudent man takes of his own property of a similar nature. The absence of such diligence is termed ordinary negligence.

Mr. Johnson's actions of yelling, cursing at and intimidating Mr. and Mrs. Trull, forcing his way into their home, fighting with Mr. Trull and ultimately causing his arrest and jailing, were clearly not negligent but intentional, and thus the exceptions available in this Code section are not available to assign responsibility to Nationscredit for the injury suffered. Moreover, in order to be "willful" for purposes of § 362(h), an action must be undertaken with knowledge of the automatic stay and be intentional or deliberate. In re Blackmon, Ch. 13 Case No. 91-10089 Adv. No. 91-1009 slip op. at 6 (Bankr. S.D. Ga. Dalis, J. March 22, 1991). If I found the actions merely negligent as would be necessary for them to fall within one of the above exceptions to non-liability, such a finding of negligence would necessarily invalidate intent and any cause of action under § 362(h) for a "willful" violation of the automatic stay.

The testimony at hearing was unrefuted that the actions of

Mr. Johnson in coming to the Trulls' home in the middle of the night, yelling and cursing at them, fighting with Mr. Trull, swearing out an arrest warrant and causing Mr. Trull to be jailed, were all outside the scope of authority of the relationship between Nationscredit and Tatum Recovery.

> The principal shall be bound by the acts of his agent within the scope of his authority; if the agent shall exceed his authority, the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none.

O.C.G.A. § 10-6-51. The principal is not bound by the acts of the agent outside the scope of his authority. First Joint Stock Land Bank v. Pitts, 48 Ga. App. 805, 173 S.E. 732 (1934). Under Georgia law, Nationscredit is not bound by the acts of Mr. Johnson which exceeded the scope of that which Nationscredit authorized him to do. But see Thrower v. Coble Diary Products Co-op, Inc., 249 N.C. 109, 105 S.E.2d 428 (1958), holding that where a loss is sustained due to the misconduct of the agent, it should be borne by those who put it in his power to do the wrong rather than by a stranger; unfortunately, this is not the law in Georgia. Because Mr. Johnson's acts exceeded the scope of the authority granted by Nationscredit to act on its behalf, I find that Nationscredit is not liable for those acts outside the scope of authority unless there was some ratification thereof.

It is possible, where there exists no express or implied authority for the tortious acts of the agent, for the principal to ratify the act of the agent and then be held liable. Colonial

Stores, Inc. v. Holt, 118 Ga. App. 826, 166 S.E.2d 30 (1968). Nationscredit was informed by Tatum Recovery that there had been some "commotion" when repossession of the boat was attempted, and still paid Tatum Recovery $250.00 for the attempted repossession as was usual between the parties. But Nationscredit's payment of Tatum Recovery is not a ratification of the actions of Mr. Johnson because Nationscredit was not aware of all the relevant facts prior to the act which could be construed as ratification payment. Hendrix v. First Bank of Savannah, 195 Ga. App. 510, 394 S.E.2d 134 (1990). The December 13, 1993 letter from Tatum Recovery informing Nationscredit of the "commotion" at the Trulls' house on December 9, 1993 states in its entirety:

> We received this assignment from your office on December 8, 1993, providing us with an address of Rt 2 Box 293-C, Soperton, Ga..[sic] Our adjuster went to this location. It was approximately 171 miles to the location of this unit. Our adjuster made an identification on the unit and was about to take possession, when the debtor's wife came out. She stated that they had filed bankruptcy back in November. After some comotion[sic], our adjuster left this location. Per your request, this account has been closed. If we can be of further assistance to you, please call.

Nationscredit's records of the Trulls' account indicates that it was notified on December 9, 1993 of the commotion with more details of the alleged assault by Mr. Trull on Mr. Johnson, but like the letter quoted above, the records mention nothing of Mr. Johnson's conduct.[1]

[1]Nationscredit was notified by telephone December 9, 1993 by either Mr. Johnson or Tatum Recovery of the attempted repossession. The entries in the Trulls' account record with Nationscredit for

Without being informed of the tortious acts of Mr. Johnson, Nationscredit cannot be said to have ratified, and thereby taken responsibility for, those acts. Because Nationscredit was not informed of Mr. Johnson's tortious acts prior to paying for the attempted repossession, I do not find that it ratified those acts by its payment.

Remaining for resolution is whether the act of hiring Tatum Recovery to repossess the boat, irrespective of the injuries occasioned by Mr. Johnson's particular conduct, was a violation of the stay and if so whether it was "willful" so as to support recovery under § 362(h). Obviously the automatic stay was violated. The automatic stay prohibits "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate," as well as "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case." 11 U.S.C. § 362(a)(3) and (6). Hiring Tatum Recovery to repossess the boat securing Nationscredit's loan to the Trulls is a violation of both § 362(a)(3) and (a)(6): Nationscredit made a clear attempt to recover the property, which became property of the estate on filing, and thereby attempted to collect or recover on the pre-petition debt.

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this date read in its entirety:

AGNT WNT CUST HOME LAST NITE/CUST PUL GUN APPEARED TO BE RIFLE/BEAT AGENT ACRSS BK AGENT GOT TO TRUCK HE THEN THRW BRICK AT TRUCK/ALSO UNLEASHED DOG (CHOW ON CUST.ADV AGENT TO CLOSE FILE WE WOULD FILE REPLEVIN/CUST STATED HE WAS FILING BK/VERNA SMITH 275-4620.
ATTY/SHE SD WAS FILED 11-4-93 CH7 93-

The only question is whether Nationscredit's actions support recovery under § 362(h), and if so, to what extent.

"Willful," as used in § 362(h), means simply acting intentionally or deliberately knowing of the bankruptcy filing. In re Blackmon, supra. The testimony at hearing raises a question as to whether Nationscredit received notice of the bankruptcy filing prior to the hiring of Tatum Recovery and the subsequent repossession attempt. Mrs. Trull testified that when she spoke with representatives of Nationscredit on October 30, 1993, she informed them that she had filed bankruptcy and gave them the name of her attorney. Nationscredit presented evidence of its account records, arguing that those records show that on October 30, 1993 Mrs. Trull stated only that she INTENDED to file, rather than HAD filed, and would call Nationscredit the following Monday with the name of her attorney and other relevant information. The actual notation in the Nationscredit account record states, "FILING BKR WCB MONDY TO ADVS." John Q. Goodwin, an employee of Nationscredit, testified that this notation indicates that the Trulls informed Nationscredit that they intended to file bankruptcy but would call back the following Monday with the name and telephone number of their attorney. Mr. Goodwin also testified that it was the policy of Nationscredit on learning that a customer had filed for bankruptcy protection to ask for the name and phone number of the customer's attorney and immediately cease all collection activities. According to Mr. Goodwin, since no definitive statement confirming the Trulls' bankruptcy filing was

forthcoming, Nationscredit's bankruptcy policies were never consulted or implemented in the Trulls' case.

As far as Mrs. Trull knew, on October 30, 1993 she and her husband had filed for bankruptcy protection: they had been to the attorney and filled out the paperwork, signed the petition, and paid the attorney the filing fee and partially for her services. While the petition was not actually filed until November 4, 1993, on October 30, 1993 the Trulls had done all they could to file. Mrs. Trull testified that she informed Nationscredit on October 30, 1993 that she HAD filed bankruptcy, not that she merely intended to file. Nationscredit received no further notice from the Trulls, their attorney, or this court for two reasons: Nationscredit's address was listed incorrectly in the mailing matrix[2] and the Trulls no longer responded to or even opened their mail from creditors, taking it to their attorney instead.[3].Mr. Goodwin testified that a "ten day" letter is one that advises that if payments are not made on the delinquent account within 10 days of receipt of the letter,

[2]While Nationscredit was listed as a creditor on the debtors' schedules, the zip code given in the schedules and used for mailings to Nationscredit was "30345-8029," while the actual zip code for Nationscredit is "30346-8029". Although the notice was not returned by the postal service, the notice from this court mailed to Nationscredit at the 30345-8029 zip code was inadequate to provide notice to the creditor and insufficient standing alone to satisfy the knowledge required for willfulness under § 362(h).

[3]Nationscredit mailed what is known as a "ten day" letter

foreclosure or repossessory action will be undertaken.[4]

I find that contrary to Mr. Goodwin's testimony regarding the account notations, Mrs. Trull did notify Nationscredit on October 30, 1993 that she and her husband had filed for bankruptcy protection. Mrs. Trull's testimony to this effect was uncontroverted: Nationscredit did not refute her testimony with that of the collection agent who had spoken with Mrs. Trull on October 30, 1993. Additionally, I find most disturbing a pattern in the account records of Nationscredit to use the past tense of the progressive form of the verb "to file" -- "was filing" -- in entering any bankruptcy information in this borrowers' account record. Mrs. Trull testified that she informed Nationscredit that she HAD filed for bankruptcy protection. In contrast, Nationscredit's records state that Mrs. Trull used this ambiguous tense form with regard to her filing bankruptcy, which is designed to leave an impression that as far as Nationscredit knew the debtor was in the process of filing but that the filing for relief under Title 11 United States Code had not yet occurred and therefore they had not received notice of a bankruptcy filing. Again, on December 9, the records of Nationscredit reflect that Nationscredit received information from Tatum Recovery that during the attempted

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, stating an intention to repossess if no response from the debtor is received within 10 days, to the Trulls on November 11, 1993, but the Trulls testified that they never opened that letter because their attorney had advised them to pass all notices from creditors along to her, which they did. Testimony at trial indicated that it was, in part, the lack of a response to this letter which induced Nationscredit to undertake to repossess the boat.

repossession Mr. Trull informed the repossession agent that "He was filing [bankruptcy]". However, by subsequent correspondence dated December 13 and quoted in its entirety, supra, Tatum Recovery advised Nationscredit that Mrs. Trull had informed the recovery agent on December 9 that "They had filed bankruptcy back in November." The Nationscredit entries were designed to create a record which would in this instance reflect that according to Nationscredit the debtor was going to file for bankruptcy protection but that filing was not yet accomplished. I find that the entries in the Nationscredit record were designed to obfuscate the truth: that Nationscredit received notice from the debtor of the bankruptcy filing October 30 and again from Tatum Recovery on December 9.

Upon being informed by a debtor that the debtor has filed for bankruptcy protection the creditor is obligated to inquire further before ignoring the verbal notice and proceeding to collect on its debt. At the very least a call to the office of the clerk of this court is required. See In re Weiss, 108 B.R. 570 (Bankr. S.D. W.V. 1989) (affirming finding of stay violation where bank made no reasonable effort to confirm debtors' statement that they had filed bankruptcy); In re Brockington, 129 B.R. 687, 71 (Bankr. D.S.C. 1991) (on report of bankruptcy filing by debtor, prudent policy is to temporarily stop, confirm, then proceed if authorized even if resumption of repossession might require state court order); In re Constantino, 80 B.R. 865, 868-9 (Bankr. N.D. Ohio 1987) (before filing complaint against plumbing contractor, developer was required

to determine status of plumbing contractor's bankruptcy where developer had received informal notice of bankruptcy). But see, In re Coons, 123 B.R. 649 (Bankr. N.D. Okl. 1991) (phone call from debtor notifying creditor of bankruptcy insufficient to constitute notice to creditor of bankruptcy); In re Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985) (statement of debtor's attorney to creditor that debtor intended to file bankruptcy too tenuous to put creditor on notice of subsequent filing). I agree with the holding in Bragg, but the facts of this case support a different finding.

Nationscredit received actual notice from the Trulls of their bankruptcy and yet failed to take any action to inquire further before employing Tatum Recovery and Mr. Johnson to repossess its collateral. Nationscredit's actions are sufficient to satisfy the requirement for recovery under 11 U.S.C. § 362(h) and Blackmon, supra, that the violation of the stay was "willful," and thus an award of actual damages. The debtors have a reasonable expectation that when they sought relief under Chapter 13 of the Bankruptcy Code that all creditors would be required to cease collection efforts against them. The willful breach of this requirement gives rise to an award of actual damages. In re Fletcher Spires, Ch. 13 Case No. 90-12223 Adv. No. 91-1052 slip op. at 6 (Bankr. S.D. Ga. Dalis, J. Aug. 9, 1991); In re Burnett, Ch. 13 Case No. 91-11600 Adv. No. 91-1096 slip op. at 17-18 (Bankr. S.D. Ga. Dalis, J. Feb. 3, 1992). By using the words "shall recover" Congress intended that the award of actual damages, costs and attorneys fees is mandatory and is not

within the discretion of the court. In re Frankie Spires, Ch. 13 Case No. 90-10115 Adv. No. 90-1078 slip op. at 5 (Bankr. S.D. Ga. Dalis, J. Feb. 21, 1991), citing In re Inslaw, 83 B.R. 89, 165 (Bankr. D.D.C. 1988). I find that the damages flowing to the Trulls from the intentional violation of the stay are ascertainable in the amount of $500, the amount originally prayed for in the Trulls' complaint.

The plaintiffs also seek an award of $5,000 for punitive damages. Punitive damages may be awarded under § 362(h) "in appropriate circumstances." I have previously held that to recover punitive damages under § 362(h),

> `[t]he defendant must have acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so.' [Citations omitted] `The purpose of punitive damage is to both punish and deter the offending party.' It should be gauged by the gravity of the offense and set at a level sufficient to ensure that it will both punish and deter the party. [Citations omitted]

In re Fletcher Spires, supra, at 7. Because punitive damages are an extraordinary remedy designed to punish and deter particularly egregious conduct, it is necessary that defendant's actions be found to deliberately violate the court's order before punitive damages may be awarded. See In re Frankie Spires, supra, at 6, quoting In re Coates, 108 B.R. 823, 826 (Bankr. M.D. Ga. 1989). Although Nationscredit received notice of the debtors' filing and hired a repossession agent without inquiry to determine whether or not a

bankruptcy had in fact been filed other factors mitigate against the imposition of punitive damages. Nationscredit never received the court notice of filing because either the debtors provided the wrong zip code to their attorney or their attorney incorrectly entered the zip code in their schedules. Additionally, neither the debtors nor their attorney responded to the "ten day" letter received by the Trulls after the October 30 telephone call which "ten day" letter also violated the §362 stay.

The modest award to the Trulls in this case does not in any way adequately compensate them for what they have suffered at the hands of Mr. Johnson. However, Nationscredit, the party here sued, can not be held legally responsible for Mr. Johnson's actions. While Nationscredit did pay for the unsuccessful effort at repossession, I do not labor under the delusion that Nationscredit does not expect results, i.e., repossession when it hires a repossession firm. Repossession agents such as Mr. Johnson know that results are expected. I am certain that Tatum Recovery is well aware that if it cannot deliver the desired result, Nationscredit will simply take its business elsewhere. By using independent contractors to perfect its self-help repossession rights, Nationscredit is able to insulate itself, under present Georgia law, from liability for the outrageous conduct of independent contractors such as Mr. Johnson. Ironically, this type of outrageous conduct is actually fostered by the very factors of Georgia law that insulate Nationscredit from responsibility -- their lack of control over the

time, manner and method of repossession. Rather than hold Nationscredit liable for the outrageous conduct of its agent, Georgia law has the effect of encouraging that conduct at no cost to Nationscredit. Unfortunately for the plaintiffs, they have failed to sue all the right defendants.

It is therefore ORDERED that judgment is entered for the plaintiffs James E. Trull and Pamela Trull against the defendant Nationscredit Commercial Corporation in the amount of actual damages prayed for in the complaint: $500.00 together with future interest as provided by law.

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JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 26th day of January, 1995.